No. 2528.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

*Appellants,*

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation,

*Appellee.*

## Appellants' Supplementary Brief.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
Of Counsel.

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FRANK D. MONCKTON, Clerk.

By.........................., Deputy Clerk.

The James H. Barry Co.
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Clerk.

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## APPELLANTS' SUPPLEMENTARY BRIEF.

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In accordance with the permission granted us by the Court, we beg to call its attention to the following matters discussed in appellee's brief:

Counsel says:

> "Appellants do not bring the entire decree here for review, but only such portions thereof as are unfavorable to them. Neither do they bring up

> the entire record in the case, but only such portions thereof as pertain to the portions of the decree appealed from."

It will be seen by reference to the record (p. 1055), that the evidence which has been brought up, is all of the evidence referring to the following matters:

1. The subscription for, taking over and cancellation of stock of said Fairbanks Banking Company by the corporation and the directors thereof, except as to the stock of Strandberg Brothers, B. E. Johnson, Emma Strandberg and John L. McGinn.

2. The declaration of the dividend by the directors of said Fairbanks Banking Company, and the payment thereof.

3. The accord and satisfaction.

4. Payment by the rents, issues and profits received and derived from the property of said E. T. Barnette and Isabelle Barnette and by the property deeded by them to the receivers.

> "One of the charges of the complaint," says counsel, "was that the directors paid the partnership, to which the corporation bank was successor, too much for the capital stock of the Gold Bar Lumber Company. The lower court found that the evidence was not sufficient to sustain the plaintiff on this item. It therefore passes out of this appeal and the evidence bearing on the same is not included in the above order allowing and settling the bill of exceptions. Nevertheless, appel-

> lants devote eight pages of their brief to a discussion of the proposition that 'The directors were entitled to take Gold Bar stock at its book value.'"

Counsel is mistaken as to the purpose of our discussion of the evidence in question, as well as to the fact of its inclusion in the record. The evidence of the value of the Gold Bar stock does appear in the record in many places and was included, not in support of the finding referred to by counsel, but as being pertinent to the question whether the directors were justified in believing that the bank had a surplus out of which it could declare a dividend.

Appellee says:

> "Counsel for appellants seem to have considered this case as a creditors' bill, and hence only rights existing strictly in favor of creditors against the officers and directors of a corporation can be enforced. In this they have misconceived the nature of the suit. It is a suit brought by a receiver of an insolvent bank against officers and directors, not to enforce the limited rights of creditors in the limited way such rights are enforced, but to enforce the claims of the bank against its faithless officers and directors for the injury done the bank."

There are some acts of misconduct the bank would have a right to take advantage of, some which a stockholder would have a right to take advantage of, and some of which the State alone would have a right to take advantage, but these three classes do not coincide. While it is said in some of the cases that the

claims of the bank against its directors and officers for mismanagement are assets of the bank, it will be found upon examination of the cases that the authority of the receiver to bring such action for the benefit of stockholders or creditors, in general, is founded upon some expressed statutory provision.

We will reply to the argument of counsel for the appellee as to those points which he presents in his reply brief in the order in which he discusses them.

## I.

### MULTIFARIOUSNESS.

Counsel says:

> "The complaint presents but one cause of action, the recovery of the bank's funds which have been diverted by the bank's trustees. It makes no difference that all the diversions did not occur at one time, or through the acts and conduct of one particular group of defendants. The defendants during the respective terms of their office were its directors, charged with the duties of quasi trustees in the management and control of its property as an entirety. That trust as to it was at all times impressed upon the property. . . . While the different breaches may have been separate and distinct one from the other, nevertheless each and all operated upon the single trust fund, depleted it here and there and broke it into fragments of which each took its respective part for the respective times. . . . The receiver by following this property and enforcing this trust presents a

single issue and one point of litigation in which all these defendants are interested."

Most of the authorities cited on page 8 of appellee's brief have no bearing upon this question of multifariousness. Most of them deal with the question of whether or not the claims against directors and officers for wrongful acts or mismanagement, are the proper subject of action by creditors or by the receiver. Most of them arise under the following sections of the National Bank Act.

Section 5239, which provides:

> "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. . . . And in cases of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

and Section 5204, which provides:

> "No association or any member thereof shall during the time it shall continue its banking operations withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital."

It is held under these sections that losses caused by mismanagement by the directors are recoverable by a receiver appointed under the National Bank Act.

Reviewing the cases cited by appellee:

*Brown* v. *Schleier,* 118 Fed., 981, was an action brought by a receiver of a National Bank against a lessee of the bank's property to declare the lease void as having been *ultra vires.* The court said:

> "The receiver is one who was appointed by the comptroller under Section 5234 of the Revised Statutes to liquidate the affairs of the bank, it having become insolvent. As such receiver he is vested with all the rights of creditors, and may doubtless challenge any wrongful act which the creditors could challenge and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts as the corporation might maintain."

All this is dicta, for the court goes on to say:

> "But we think that in virtue of his office as receiver he is not authorized to *challenge or impeach an executed transaction* between the bank and a third party like the one now in hand and which though known to the United States through its proper officials at the time it was undertaken and consummated, and while the excessive investment of its funds was being made was neither arrested nor complained of by the United States or any creditor or stockholder of the bank."

*Sargent* v. *American Bank,* 154 Pac., 761, was an action by the Oregon Superintendent of Banks whose duties and rights are "analogous to those of the receiver of a national bank or trustee in bankruptcy under Federal Statutes."

*McTamany* v. *Day* (Idaho), 128 Pac., 563, was an action by a judgment creditor against directors and stockholders for dividends received and other wrongful acts.

It was held that the action could not be maintained, as the right of action was in the receiver.

*Bailey* v. *Mosher,* 63 Fed., 488, was an action by a creditor against the directors of an insolvent *National* Bank to enforce personal liability under Section 5239, Rev. Stat. It was held that the right of action was in the receiver, the liability being an asset.

*Yates* v. *Jones National Bank,* 105 N. W., 287, and *Cockrill* v. *Abeles,* 86 Fed., 505, also rose under the National Bank Act.

Counsel attempts to reply to our contention that the complaint in this action is in direct violation of the Alaska Statute in relation to joinder of actions, by contending: First, that the Act of Congress creating the Alaskan Code was in effect repealed by the Equity Rules of the Supreme Court. This position needs but the mere statement of it to constitute its own refutation. Second, that the decisions of the Federal Courts are controlling in this case in determining what is multifariousness. This position also proceeds upon

the assumption that the Federal Statute regulating practice in the Alaska Courts is not binding upon this Court. Third, that the decisions of the Federal Courts and many of the State Courts hold that a complaint like the one herein presents but *one cause of action.*

We have examined the cases cited by counsel in support of this view and fail to find a single one that sustains him. Many of them hold that under the facts set up the bills were not multifarious, and, of course, a bill may set up distinct causes of action in many circumstances and not be multifarious. None of the cases, however, go so far as to hold that a complaint like the one here presents but *one cause of action,* which is the point appellee seeks to establish in order to get around his violation of the Alaska Statute. Let us review the authorities cited by him:

*Heckman* v. *U. S.,* 224 U. S., 413, was a bill filed by the United States to cancel conveyances by Indian allottees on the ground that they were in violation of existing restrictions upon the power of alienation. It was held that the bill was not open to the objection of multifariousness or misjoinder, because the suit involved a large number of separate conveyances by individual Indian allottees to distinct grantees made parties defendant, the Court saying:

> "A further objection is that the bill is multifarious. But in view of the numerous transfers which the Government attacks, it was manifestly in the interest of the convenient administration

> of justice that unnecessary suits should be avoided, and that transactions presenting the same question for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit."

*Mullen* v. *U. S.,* 224 U. S., 448, was likewise a bill filed by the United States to cancel conveyances by heirs of Indian allottees on the ground that they were in violation of existing restrictions against the power of alienation. It was held that the bill was not open to the objection of multifariousness or misjoinder, because the suit involved a number of separate conveyances by individual Indians to distinct grantees made parties defendant.

*Graves* v. *Ashburn,* 215 U. S., 331, was a bill to cancel a deed for fraud. The bill charged a *conspiracy* among several trespassers and trespassees, extending over the greater part of four contiguous lots. It was held that the objection of multifariousness would not prevail.

*U. S.* v. *American Bell Telephone Co.,* 128 U. S., 315, was a bill praying for the cancellation of two patents issued at different times. It was held that it was not multifarious, because both patents were issued to the same person and held by one defendant, related to the same subject and the later was for an improvement upon the invention in the earlier one.

*Brown* v. *Safe Deposit Co.,* 128 U. S., 403, was an action brought by creditors to enforce judgment

against a corporation. Brown was made a defendant, it being alleged that he was asserting a vendor's lien on some of the property transferred by the vendor to the company. A mortgagee of the company's property filed a cross-bill alleging that Brown had entered into contracts to convey the property upon payment of the price to the company's vendor, and that the latter's right and interest had been transferred to the company and by it mortgaged. He prayed for the specific performance of Brown's contract and for a foreclosure of the mortgage and accounting. It was held that the cross-bill was not multifiarious.

In the case of *Harrison* v. *Perea,* 168 U. S., 311, which was an action to recover possession of an estate, a cross-bill was filed, and it was held *to be* multifarious, because the matters therein set up were not connected with the issues raised by the original bill.

*Heyden* v. *Thompson,* 71 Fed., 60, was an action by the receiver of a National Bank against its shareholders to recover dividends unlawfully paid to them out of the capital at times when the bank had earned no net profits and was insolvent. It was held that the fact that some of the defendants participated in but one or two of the sixteen dividends on which the suit was based, that others participated in more, and others in all of the dividends, did not render the bill multifarious.

*Kelley* v. *Boettcher,* 85 Fed., 55, was a suit in which it was sought as against one of the defendants to can-

cel a deed for an interest in a mine, and as against such defendant and two others to recover the proceeds of ore extracted from such mine. It was held that the bill was not demurrable for misjoinder, since it alleged that all of the defendants joined in employing an agent, who by false representations and concealments procured the deed which it was the main purpose of the suit to set aside.

*Curran* v. *Campian,* 85 Fed., 67, was a case similar to *Kelley* v. *Boettcher, supra,* and arose out of and affected the same property. On the authority of that case it was held that the bill was not multifarious.

*Cockrill* v. *Cooper,* 86 Fed., 7, was an action by a receiver of a National Bank against the directors for misconduct. The question whether the bill was multifarious or not was not presented.

*Wyman* v. *Bowman,* 127 Fed., 257, was an action to collect unpaid subscriptions of nine defendants. The question was whether the jurisdiction of equity could be invoked to avoid a multiplicity of suits. The question of multifariousness in the pleading was not raised.

*Boyd* v. *Schneider,* 131 Fed., 223, was an action by a depositor of a National Bank of Illinois on behalf of himself and of others who might join him, against the directors of the Bank to recover losses to the assets of the Bank alleged to have been brought about by the negligence and misconduct of the defendants. It was held that in as much as the right of each depositor

to recover was based upon the same theory, the bill was not multifarious.

In *U. S.* v. *Allen,* 179 Fed., 13, it was held that a bill filed by the United States to cancel some 4000 conveyances made by individual Indian allottees to the several defendants was invalid, because made in violation of the statute imposing restrictions upon the alienation of the land of the Indians, is not multifarious.

*Benson* v. *Keller,* 60 Pac., 218, was a suit to cancel certain due bills alleged to have been fraudulently procured, and it was held that the bill was not multifarious, because of the joinder of two defendants to whom different bills had been assigned as collateral security.

Not a single case cited attempts to hold that a bill similar to the one in this suit *states a single cause of action.* As the Supreme Court of the United States said in the well known case of *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.,* 171 U. S., 55:

> "It must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. . . . We make these observations, because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the vir-

tues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, What saith the statute?"

## II.

### THE FAILURE TO PLEAD THE CORPORATION LAW OF NEVADA.

We respectfully submit that the appellee has not made a fair answer to our contention in this regard. He calls the Court's attention to the fact that he alleges in his complaint that, "there were no net profits on hand out of which said dividends could be *legally* paid"; "that said corporation wrongfully and *unlawfully* began to reduce its issued capital stock"; "that the wrongful, *unlawful,* fraudulent and negligent acts and conduct of the defendants were the proximate cause"; "that by reason of said wrongful, *unlawful* and negligent acts, etc."

He says:

> "Reverting now to the claim that the allegations of the complaint are not sufficient to charge a statutory liability under the Nevada Corporation Law, because said law is not specifically pleaded, we find it is charged that said dividend was not declared and paid out of, nor said stock purchases made with, the surplus, undivided profits or earnings of the bank . . . that such acts and conduct were *unlawful* and could not be *legally* done."

It is, of course, elementary that "unlawful," "illegal" and the like are mere words stating conclusions. If it were necessary to prove the Nevada Law, it was certainly necessary to allege it, and *without the allegation the face of the complaint failed to show a cause of action* in this regard. It was not necessary to raise it by demurrer, as the failure to state a cause of action, of course, could be taken advantage of at any stage of the proceeding.

> "Although defendant pleaded over, after the overruling of its demurrer to the declaration, went to trial, and failed to renew the demurrer, or ask for verdict under all the evidence at the close of the case, the sufficiency of the declaration to state a cause of action may be reviewed as an unassigned error appearing on the record."

> *Mound Coal Co.* v. *Jeffrey Mfg. Co.,* 233 Fed., 913;
> *Teal* v. *Walker,* 111 U. S., 242;
> *Lehnen* v. *Dickson,* 148 U. S., 71.

Even had defendants failed to demur, they would not have waived the point, for Section 894 of the Compiled Laws of Alaska provides:

> "If no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same excepting only the objection to the jurisdiction of the Court and *the objection that the complaint does not state facts sufficient to constitute a cause of action.*"

The fact that there were several causes of action mingled together in the complaint, some of which involved a liability founded upon the Nevada statute, and others of which involved a purely common law liability, made it impossible to attack the complaint as a whole by general demurrer, and so raise the question of the failure to plead the Nevada statute. Had, however, the different causes of action been separately stated, as required by the Alaska statute, it would have been possible to have presented this question directly by demurrer to such of the counts as did involve the Nevada statute.

This certainly emphasizes the virtue of enforcing the statute requiring the separate statement of the various causes of action.

The fact that the defendants offered in evidence portions of the law of Nevada in attempting to rebut evidence introduced by the plaintiff, could not amount to an estoppel or waiver upon their part, nor was it necessary to reserve any exception to the action of the Court in admitting the evidence, for the question could always be raised, as here, upon the judgment roll.

## III.

### THE LIABILITY FOR DECLARING THE DIVIDEND.

Before the directors could be held liable for payment of the dividend, it was necessary to find, not only that there was no surplus, but also that they knew it, or had reason to know it. This point we have fully covered in our opening brief—see Appellant's Brief (pp. 104 *et seq.*).

This fact was neither proven nor found. It was essential if there was to be any recovery against the directors on the ground of any so-called common-law liability.

This leaves the dividend open to question only on the other ground urged "that it was in violation of the law of Nevada."

To which we come back again with our answer, "The law of Nevada is not pleaded or found."

In attempting to show that there was no surplus out of which the dividend of April 12th, 1910, could be declared, appellee relies upon the fact (p. 19) that on that day the bank was carrying as assets the following:

| | |
|---|---|
| Gold Bar Lumber Co. stock........ | $341,949.00 |
| Washington-Alaska Bank of Washington stock .................... | 250,000.00 |
| Paper then past due and still unpaid.. | 111,243.51 |

On his own admission (p. 2) he is not in a position to question this valuation of the Gold Bar Lum-

ber Company stock. As to the valuation of the Washington-Alaska Bank of Washington stock, the evidence was as follows:

The witness Parsons, who was Vice-President and General Manager of the Washington-Alaska Bank testified:

"Q. Do you remember about what the amount of your deposits was at that time?

"A. To which time do you refer?

"Q. At the time of the sale to the Fairbanks Banking Company.

"A. If I recall correctly, somewhere in the neighborhood of *$1,900,000;* it may have been a little more or a little less—somewhere in that neighborhood.

"Q. Do you remember about what the amount of your loans and discounts was?

"A. A little less than $300,000, if I remember correctly.

"Q. About what per cent. of cash did you have on hand?

"A. Do you mean cash or do you mean reserves—cash and exchange?

"Q. Cash and exchange.

"A. We had, at the time we sold, in excess of ninety per cent. of cash and exchange.

"Q. What do you mean by cash and exchange?

"A. I mean cash in our vaults and cash in other banks on the outside with our correspondents.

"Q. What had been the earning capacity of that bank from the time of its organization in 1905 up to the time of the sale, each year, approximately?

"A. Oh, I think our average earning power was somewhere in the neighborhood of *$50,000* a year.

"Q. This statement shows that upon the 13th day of September, 1909, that the loans and discounts amounted to the sum of $258,545.35, that is about correct?

"A. That is taken from the books at that time? (pp. 557-558).

"Q. At that time.

"A. Then it must be correct."

The witness Barbour, who was cashier of the Washington-Alaska Bank, testified:

"Q. Do you know what the earning capacity of that bank was during the years 1905-6-7-8 and up to September of 1909?

"A. Yes, sir, I do.

"Q. Will you state approximately what they were per year?

"A. Well, I don't know—I have not ever figured it, but the *capital and surplus and profits* as shown by the statement of September (I think it was something like from two hundred and eighteen to two hundred and twenty-five thousand)—you might say nearly all profits from the business.

"Q. But there had been dividends declared.

"A. There had been *dividends* on approximately one hundred per cent. of the capital declared at the end of the first year (p. 637).

"Q. Do you know the amount that the Fairbanks Banking Company paid for the Washington-Alaska Bank?

"A. $250,000.

"Q. I will ask you to state whether, in your opinion, with the knowledge of the conditions of the Washington-Alaska Bank and the amount of business that they had done and their condition at that time, the sum of $250,000 was a fair, reason-

able and conservative price for the Washington-Alaska Bank?

"A. I think the price was *very low*" (p. 638).

It is not too much to say that the good will of a bank with a capital of $150,000.00 and surplus of $56,000, which is paying annual dividends of $50,000 and which has been doing so for some years past, is worth $75,000.00, and if such were the case the bank was entitled to include that good will in the valuation of the stock in carrying it on its books.

> "When the stock of a corporation has been issued for the good will of several separate establishments, and is claimed that the value thereof has depreciated, the court cannot determine that it has, in the absence of positive evidence of the value of such good will at the time of the issue of the stock and at a later time, and the fact that some of the establishments have been closed while their customers are supplied by the product of other establishments does not prove a depreciation."

*Washburn* v. *National Wall Paper Co.*, 81 Fed., 17.

With regard to this $111,243.51 of past due paper, of which $69,908.94 was paper that had been received from the partnership in March, 1908, we refer to page 113 *et seq.* and 131 *et seq.* of our opening brief.

Upon the proposition "That the defendants are liable for declaring and paying the dividend under the

evidence and the facts found by the Court," the appellee cites the following:

*Siegman* v. *Elec. Veh. Co.* (N. J.), 65 Atl., 910, which was decided under a New Jersey statute which forbade *a corporation* to make dividends except from the surplus or net profits arising from its business, etc., and made the directors liable to the corporation unless they caused their dissent to be entered in the minutes and published in a newspaper.

*Coleman* v. *Booth* (Mo.), 186 S. W., 1021, was a case of actual fraud where the directors inflated the assets by increasing the book value of the good will and thus created an apparent surplus out of which they declared the dividends in question.

*E. L. Moore Co.* v. *Murchison,* 226 Fed., 679, was an action by a trustee in bankruptcy of a corporation against its directors and officers to recover dividends illegally paid. The Court said "It is well settled that, " when directors declare a dividend in good faith, " and without negligence, they are not to be held " liable merely because the dividend turns out to have " impaired the capital stock," but holding under the facts in the case, that the directors ought to have known that the dividends had not been earned.

*Briggs* v. *Spaulding,* 141 U. S., 132, 35 L. Ed., 662, was an action brought against directors of a national bank for injuries growing out of their negligent mismanagement. Judgment went in favor of the directors, which was sustained on appeal.

*Cottrell* v. *Mfg. Co.,* 126 N. Y. S., 1070, was an action to recover from a stockholder dividend paid to him out of the capital, he knowing such to be the case. The Court says, "The Courts have sometimes " refused to apply this rule when either the directors " or stockholders, or both, have made and received " the dividend in good faith."

*Cooper* v. *Hill,* 36 C. C. A., 402; 94 Fed., 582, was an action as already stated, to recover from directors moneys of the bank spent by them in prospecting a mine which they had taken over for a debt. There was no question of dividend involved.

*Cockrill* v. *Cooper,* 29 C. C. A., 529; 86 Fed., 7, is a case arising out of the National Bank Act and governed by its provisions.

## IV.

### LIABILITY FOR STOCK PURCHASES.

The liability of the directors for the surrender of the stock again is predicated entirely upon the unpleaded Nevada law.

And except in one or two instances there is no finding that the acts were knowingly done. The finding is that they were acquiesced in (Finding 54), whether before or after the fact does not appear.

*Maryland Trust Co.* v. *Bank* (Md.), 63 Atl., 70, is against the weight of authority in holding that a provision of the Articles of Incorporation authorizing

the dealing in stocks does not include dealing in the corporation's own stock.

*Cooper* v. *Hill,* 94 Fed., 582, is cited as authority for the proposition that if the Articles did authorize the purchase of its stock for the bank, the same would be void because in conflict with the (unpleaded) statute of Nevada under which the bank was incorporated. This was an action by the receiver of an insolvent National Bank against the directors for money expended by them in operating and prospecting a mine which the bank had taken for a debt. No question of stock purchase or surrender was involved.

In regard to one stock purchase, at least that of the Wood stock, there was the further defense that the executed contract could not be impeached.

In *Weber* v. *Spokane National Bank* 64 Fed., 210, it was said:

> "Is the inhibited debt void, and may the banking association retain the property which it acquires under such circumstances, and deny its liability for the stipulated consideration? We find no reported decision of this question, but certain other sections of the statutes defining the powers of national banking associations, and prohibiting them from doing certain specified acts, have been the subject of adjudication. The tendency of all the decisions has been to refer to the general government the power to deal with all violations of the act, and to hold that acts done without the scope of the prescribed powers of the bank, or in violation of the express terms of the statute for their guidance, are not void, but are viodable only,

Thus section 5136, by implication, prohibits a national bank from loaning money upon real estate security; yet it is held that a mortgage taken upon real estate to secure a contemporaneous loan or future advances is not void, but merely voidable, at the instance of the government. *Bank* v. *Matthews,* 98 U. S., 621; *Bank* v. *Whitney,* 103 U. S., 99. Section 5201 expressly prohibits a loan by a national bank upon the pledge of its own shares; but it has been held that, if the prohibition could be urged against the validity of a transaction by any one except the government, *it could only be done before the contract was executed,* and while the security remained pledged, and that the illegality of the transaction would not render the bank liable to the pledger for the payment to him of the money realized upon the sale of the security. *Bank* v. *Stewart,* 107 U. S., 676, 2 Sup. Ct., 778. Section 5200 provides that no bank shall loan to one person or firm an amount to exceed one-tenth of its actually-paid capital stock; but it is held that, if a greater sum is loaned than is allowed by this section, that fact may not be set up in defense to an action for recovery of the money so loaned (*Gold Min. Co.* v. *National Bank,* 96 U. S., 640), and that the statute was intended as a rule for the government of the bank, and did not render the loan void (*O'Hare* v. *Bank,* 77 Pa. St., 96; *Pangborn* v. *Westlake,* 36 Iowa, 546). We think the reasoning upon which these conclusions are reached is applicable to the case before the court. We hold, therefore, that an indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by the statute, or is even incurred in violation of the positive prohibition of the law in that regard."

In regard to the Wood stock, it was argued in No. 2594, to which we may as well refer here, that the corporation received nothing when it received this stock, for the reason that it was of no value as the assets transferred from the partnership were so inflated in value that the corporation was insolvent from its birth.

In this connection we would call the Court's attention to the testimony of Sidney Stewart, the receiver's principal witness:

> "Q. I would like to ask you to refer to the book called the Daily Statement of the *29th day of August, 1908*.
> "A. Yes, sir (opens book).
> "Q. I wish you would take a paper and a pencil, and I will ask you to write down the amount that was due the Fairbanks Banking Company from the Bank of British North America on that date.
> "A. $3,132.27.
> "Q. How much was due this bank from the First National Bank of San Francisco?
> "A. $2,052.40.
> "Q. And the National Park Bank of New York?
> "A. $17.66.
> "Q. And the Seattle National Bank?
> "A. $714.86.
> "Q. Valdez Bank and Mercantile Company?
> "A. $791.78.
> "Q. Dexter-Horton?
> "A. $400,107.39.
> "Q. Sundry Banks?
> "A. $100.

"Q. Bank of California, San Francisco?
"A. $985.21.
"Q. J. W. McCormick?
"A. $381.92.
"Q. Shepard Brothers and McBride?
"A. $45.94.
"Q. Cash on hand?
"A. $193,007.54.
"Q. Gold-dust on hand?
"A. $125,891.94.
"Q. Can you figure that up and give me the total?
"A. $727,228.91.
"Q. Now, I would ask you to refer to the amount due depositors. They kept two accounts there, didn't they? Ordinary and savings accounts?
"A. Yes, sir.
"Q. How much was due to ordinary depositors?
"A. $660,519.41.
"Q. How much was due the savings account?
"A. $37,305.03.
"Q. How much was due the depositors of the Cleary Branch?
"A. Due to Cleary Branch $59,186.41.
"Q. And the Dome City Bank, being a branch bank?
"A. $425.37.
"Q. J. P. McCrosky, agent?
"A. $1523.92.
"Q. Alaska Bank, Nome?
"A. $1095.74.
"Q. Outstanding scrip?
"A. $390.00.
"Q. Old Bank collections; not the interest, just the collections?
"A. $2,378.54.

"Q. I will ask you to state whether or not those were all the demand liabilities that existed on that date, except the Dexter-Horton matter?

"A. Except the Dexter-Horton $200,000?

"Q. Yes, sir?

"A. And the Barnette special deposit.

"Q. That was not due at that time, I mean, on demand; and excepting the savings, which was not a demand either.

"A. The Scandinavian-American Bank.

"Q. That is a disputed account, is it not?

"A. I don't know what the dispute was at that time.

"Q. What is the amount of it?

"A. $9,746.19.

"Q. Leaving that out, is there anything else there?

"A. The capital stock liability.

"Q. Just figure up what you have there?

"A. $762,824.42, I make it.

"Q. Did you know who J. W. McCormick was?

"A. Yes, sir.

"Q. He was the agent of the bank, buying gold-dust?

"A. I presume that is what this is intended for.

"Q. Shepard Brothers & McBride acted as agents for the bank out on Fairbanks Creek?

"A. I don't know them.

"Q. Those items such as, due from Bank of British North America, First National Bank, etc., are all available cash. You know that?

"A. What?

"Q. That is available cash, money on deposit in other banks; that is considered available cash?

"A. That is considered available, yes, sir.

"Q. Ready for instant use?

"A. Yes, sir.

"Q. I will ask you to state what the difference is between the amount of cash and gold-dust that was available to the bank upon that day, and the amount of its then demand obligations, as you have read them out here.

"A. The liabilities exceed these assets in these figures to the extent of $35,595.51.

"Q. In other words, the Fairbanks Banking Company, upon the *29th day of August, 1908,* had sufficient money to pay all of their depositors—sufficient money on hand to pay all of their depositors, with the exception of about $35,595.51. Isn't that true?

"A. That is what this figures out, from these figures.

"Q. There can't be any mistake about those figures?

A. No, sir, that is what the book shows.

"MR. RIDER: You mean the depositors you have listed?

"MR. McGINN: A. The depositors here; also due depositors at the Bank of Cleary, depositors of the Dome City Bank, J. J. McCormick, the agent of the bank, Alaska Bank at Nome; what was due them; also outstanding scrip $390; old bank collections amounting to $2,378. What other liabilities did the bank have on that date, not including the capital stock and not including the Scandinavian-American bank?

"A. E. T. Barnette special, deposit $200,000, and the bills payable $200,000.

"Q. What do you mean by 'bills payable'?

"A. That I believe was the Dexter-Horton.

"Q. What else?

"A. The old bank interest $39,000.

"Q. That was not due at that time, was it? Well, put it down. Anything else?

"A. $483.59.

"Q. That covers all the liabilities except the capital stock?

"A. Yes, sir.

"Q. What does that amount to?

"A. The outstanding capital stock?

"Q. No. What is the total of those items that you have there?

"A. The total of these items is $439,483.59.

"Q. What were your loans and discounts upon that date?

"A. $282,836.81.

"Q. What was your real estate?

"A. $26,817.63.

"Q. Gold Bar stock?

"A. $341,949.

"Q. Can you tell approximately what amount of interest was then due to the bank which had not yet been collected?

"A. No, I cannot.

"Q. Can you tell whether or not that would about offset that item of $39,000?

"A. That is a pretty hard matter to give for me.

"Q. Could you tell whether it would be ten, twenty or thirty thousand dollars?

"A. It would be a mere guess.

"Q. You have no means of telling?

"A. No, sir.

"Q. What does that figure up? That is everything there is, is it?

"A. $651,603.44.

"Q. The total liabilities were $439,483.59, were they not?

"A. Those were those four items.

"Q. What is the difference between those items?

"A. $212,119.85.

"Q. How much was the capital stock upon that date?

"A. $300,000.

"Q. How much paid up; I mean, subscribed stock, outstanding stock?

"A. $188,200.

"Q. What is the difference between the surplus and the outstanding stock?

"A. The difference between the $199,000 and the $212,000?

"Q. Yes.

"A. $23,919.85.

"Q. That does not include any interest that was then due?

"A. No, sir.

"Q. So, then, you say that the Fairbanks Banking Company upon the *29th day of August,* according to their books, had sufficient money to pay all of their depositors and what was due to banks, with the exception of about $35,000; that is, they had cash in hand practically?

"A. Well, it had that cash in hand sufficient to pay, excepting $35,000, those items I read there.

"Q. All their depositors, and what was due banks?

"A. Yes, sir, those items.

"Q. They had sufficient to pay, with the exception of $35,000?

"A. Yes, sir.

"Q. They owed Dexter-Horton at that time $200,000?

"A. Yes, sir.

"Q. But they had loans and discounts amounting to the sum of $282,000?

"A. Yes, sir.

"Q. So that their loans and discounts, if all but $82,000. of them were paid, would be sufficient to pay Dexter-Horton?

"A. Figuring that way, yes, sir.

"Q. They owed Barnette on a special account $200,000?

"A. That is correct.

"Q. They were carrying Gold Bar at $341,000?

"A. Yes, sir.

"Q. So, Gold Bar, ought to have been sufficient to pay Barnette?

"A. Yes.

"Q. Then they had the real estate here, and the interest that was still due, to pay the balance of the $35,000 that was due depositors that they didn't have sufficient money on hand to pay, isn't that true, on the surplus and the loans and discounts?

"A. And that interest that belonged to the old bank should be considered here, too.

"Q. You have got that included there?

"A. It is included in that $439,000 part of the liabilities there.

"Q. But I am asking you about the $35,000 that they lacked in cash to pay all of their depositors on that date and what was due to banks.

"A. Yes, sir.

"Q. They had their real estate here and interest on existing loans to pay that, didn't they, and the surplus in the profit and loss account?

"A. You figure that the loans would take care of the Dexter-Horton and Gold Bar take care of Barnette.

"Q. Gold Bar would certainly take care of Barnette?

"A. Yes.

"Q. And there was real estate and surplus enough to take care of the $35,000?

"A. Yes.

"Q. It would do that?

"A. Yes.

"Q. So that they had $82,000 loans and discounts that exceeded the claim of Dexter-Horton; they had the difference between the $341,000 which they were carrying Gold Bar for and the $200,000, to pay this $39,000 that was due the old institution and to pay the subscribers or stockholders for their stock?

"A. I think that would figure out about that way, on those figures.

"Q. As a matter of fact, it practically shows that they could pay every depositor on that day in full. Wasn't that the condition of the bank on the 29th day of August?

"A. Well, in my statement I have taken the statement just as they show it on this daily statement book.

"Q. According to the books. That is where you got all of your statements?

"A. Of course. I have not figured it the way you have figured it.

"Q. But you can't get away from those figures.

"A. I admit, if you were to figure that way, that (interrupted).

"Q. Figure it any way?

"A. I say; when I figured the other, these figures from these books was what was called for.

"Q. You didn't testify to this date, the 29th?

"A. I don't remember.

"Q. Do you know whether or not upon that date the depositors of the bank—or that there were depositors of the bank that owed the bank in the aggregate the sum of $35,000?

"A. That there were depositors that owed the bank?

"Q. Yes. Notes not due that they owed the bank at that particular time.

"A. I have never gone into that" (pp. 404-411).

So that it appears from the record that the assets of the bank were sufficient a few weeks after the Wood transaction to pay off all the depositors in cash, take care of the creditors and leave assets sufficient to redeem the stock at par.

As bearing on the good faith of this transaction, it should not be forgotten that Hill, who sold his interest at the same time with Wood, chose to take his share in stock of the new corporation, which he certainly would not have done had there been any belief on his part that the stock was without value.

## V.

### EXISTING CREDITORS.

Appellee says that it need not be shown that the creditors were such at the time the alleged wrongs were committed, and cites several cases in support of his position.

In *Hammon* v. *Taylor Rice Engineering Co.,* 84 Fed., 393, the question was not raised. In this case a promissory note was involved which was given by the corporation for the purchase price of some of its own capital stock. It was claimed that the receiver, as representing the corporation, was not entitled to present any defense which the corporation could not

have presented. The court, however, held that the receiver represented the creditors and had the right to assert any defense to which the creditors in contradistinction to the corporation might have been entitled. The question, however, as to whether the defense could have been raised by creditors who were not such at the time the note was given, was not raised.

*North* v. *Union S. & L. Assn.* (Oregon), 117 Pac., 822, was a suit by stockholders to compel the directors to account for assets which it was claimed the latter had absorbed. The question was discussed whether in an action of that kind the stockholders must show that they were such at the time of the commission of the act complained of, and the Court held that while the rule of the Federal Courts was that they must so show, it would not take that position itself.

In addition to the cases cited in our brief upon this proposition, we desire to refer to the case of *Coe* v. *East & West Railroad Company,* 52 Fed., 513. In that case, certain stockholders and directors of a railroad company, who owned a controlling interest therein, negotiated a contract between it and an iron company in which they were stockholders and directors, by which the railroad company leased certain property from the iron company and paid in stocks and bonds. Subsequently a consolidated mortgage was placed upon the property to secure a fur-

ther issue of bonds. It was held that even if the railroad company had been wronged or cheated, subsequent creditors, to-wit, the holders of the subsequent bonds and subsequent purchasers, had no right to question the transaction as long as the railroad company acquiesced and no intention to defraud subsequent creditors was shown.

## VI.

### THE BARNETTE DEEDS.

The question of the accord and satisfaction in whole or in part was fully gone into in our opening brief.

Our case rests entirely upon the written documents and the acts and conduct of the parties. The written documents include:

1. The Barnette petition.
2. The order of the court referring the matter to the receivers.
3. The petition of the receivers.
4. The order of the Court directing the receivers to accept the trust deeds.
5. The deed to the Alaska property.
6. The deed to the Mexican property.
7. The reply of the receiver herein.

The deeds recited "that the receivers are about to " commence an action for and on behalf of *creditors* " against E. T. Barnette to recover from him the

" amount of any deficiency that may be ascertained
" as between the claims of the creditors above men-
" tioned (depositors and holders of unpaid drafts)
" and the amount realized out of the property and
" assets of said bank; *said actions to be based on the*
" *liability of said E. T. Barnette to said creditors,*
" ARISING OUT OF HIS MANAGEMENT OF THE AFFAIRS
" THEREOF."

These words show what was the subject matter of the accord, Barnette's liability to the creditors arising out of his management of the affairs of the bank. This liability covered at one point or other the liability of every defendant in this case.

The authorities hold as we showed in our opening brief that the intention of the parties may be ascertained from the surrounding circumstances.

There surely was some object or motive which inspired Barnette and his wife to execute the trust deeds, some consideration which induced them to those acts. We contend that that consideration appears from the transaction itself, from the fact that the suit was threatened against Barnette *based on his liability* to the creditors arising out of his management of the affairs of the bank. What purpose could he and his wife have had in transferring their property to the receivers unless upon the understanding that it was accepted wholly or partially in settlement of his liability? Otherwise, it was without purpose as far as they were concerned. If it was wholly or partially in

settlement of his liability, the other *tort-feasors* are entitled to the benefit of the settlement. The receiver in his reply says that the acceptance of the trust deeds operated as an agreement not to sue Barnette before Nov. 18, 1914. Why that particular date? Because that was the date when the new promise made by Barnette in the trust deeds would mature, the date when he expressly bound himself to pay off the deficit. The receivers said in their petition that if they accepted the trust deeds it would be "impracticable" to sue Barnette. There must have been some foundation for this statement or belief. Why would it have been "impracticable"? If the receivers took the trust deeds without any promise or understanding on their part, what could prevent their suing him? Their ability to sue was not impaired by the acquisition of property. They could have brought suit the next day upon all the various acts sued on in the case at bar, but for one thing—they had accepted Barnette's new promise contained in the trust deeds and that acceptance operated as an accord and satisfaction or, to use the language of the receivers' reply, "as an agreement not to sue" (p. 186).

Of course, the decisions hold that a covenant not to sue is no bar to an action against a *co-tort-feasor*. That would be true here had the parties stopped with a mere covenant not to sue. But they went farther. They entered into a new arrangement by which the receivers accepted a new promise from

Barnette, performance of which was secured by the hypothecation of his wife's property along with his own. It seems perfectly plain to us, that the receivers had put themselves in such a position that they were bound to rely on the contract evidenced by the trust deeds and had parted with the right to maintain any action against Barnette founded on the original torts.

Counsel asks (p. 50) "If Barnette was settling a tort liability, why should he settle it only as to depositors and holders of unpaid drafts? Would he not include in such settlement the stockholders and all creditors of the bank of every character whatsoever?"

We reply: Barnette was not settling a liability as to any particular class of creditors. He was settling his liability to the receivers by the payment of an amount arrived in a particular way, i. e., the deficit ascertained in the manner provided in the trust deeds (p. 1043). It was the measure adopted to fix the amount.

Appellee makes the point that Barnette only agreed to become liable for "any deficit that may be hereafter " ascertained as between the amounts due such de- " positors and holders of unpaid drafts— . . . " and the amount realized out of the property and " assets of the bank and paid to such creditors." And he says "The claim of the bank against its faith- " less officers . . . is an asset in the hands of the " receiver and under the express provisions of the

" trust deeds above quoted, that asset must be collected " in before any of the trust property can be used." *No such construction can be given to the word "assets" used in the trust deeds as to make it mean claims of the character just referred to. In the first place, the deeds of trust refer to the assets of the bank as being at that time in the hands of the receivers.* In the second place, the construction asked for would lead to an absurdity. For the liability of Barnette himself for his tortious acts would be an asset of the bank as much as that of any of the other officers and directors which would have had to be exhausted before the deficit could be ascertained. Such a construction is plainly a palpable absurdity.

Appellee asks "Why should the $50,000 claimed to be in the hands of the receiver as such rents and profits be applied in one series of claims and for the benefit of these particular defendants to the exclusion of those affected by the claims involved in the appeals referred to?"

In the first place the question is not pertinent in view of the fact that the Court found that the total liability of the directors from the organization of the bank until its close was approximately the sum of $50,000 which was the amount of the judgment rendered against Jesson who was a director during that entire period.

Second, suppose Barnette had made an agreement with the receiver to pay him $50,000 in consideration

of a full exoneration from all his liability for these joint-torts. Then suppose he paid the receiver $25,000 in part payment. Which of the various joint *tort-feasors* could claim the benefit of this payment as a *pro tanto* satisfaction?

We say all of them, notwithstanding their liabilities grew out of different transactions, Barnette being a joint *tort-feasor* with all of them.

Respectfully submitted.

McGOWAN & CLARK,<br>
A. R. HEILIG,<br>
JOHN L. McGINN,<br>
Attorneys for Appellants.

METSON, DREW & MACKENZIE,<br>
CURTIS HILLYER,<br>
CHARLES J. HEGGERTY,<br>
Of Counsel.